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No. 75-427

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN R. MARTIN AND
THEIL TECHNICAL SERVICES, INCORPORATED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that the government improperly relied upon the presumption of administrative regularity rather than upon substantive proof to establish an essential element of the offense.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and of payment of illegal fees to a prime contractor holding a negotiated contract with the United States, in violation of 41 U.S.C. 51 and 54. Each petitioner was fined $35,000. In addition, petitioner Martin, the president of petitioner Theil Technical Services, was sentenced to concurrent terms of two years' imprisonment on each of the seven counts on which he was convicted; all but three months of that term were suspended. The court of appeals affirmed on June 10, 1975

(Pet. App. 1a). The petition for a writ of certiorari was filed on September 18, 1975, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. In any event, there is no reason to grant the petition.

Theil Technical Services, Inc. was engaged in the business of preparing and publishing technical aircraft manuals. Petitioners concede (Pet. 3) that between 1971 and 1974 Grumman Aerospace Corporation, a contractor with the United States Navy, awarded Theil various subcontracts in return for kickbacks to Grumman employees. The amount of the kickback was added to Theil's price and consequently passed on to the government as part of Grumman's price.

Petitioners contend that the government has failed to prove that Grumman's contracts with the Navy were "negotiated"—that is, " 'made [without] formal advertising,' " 41 U.S.C. 52—but that it relied instead on a "presumption" of adminstrative regularity (Pet. 2, 6). But no such "presumption" is involved in this case. The prosecution introduced direct proof that the contracts were negotiated. First, Grumman's Director of Corporate Audits testified that these contracts were negotiated (Tr. 47, 56-58, 92-93, 129-130). Second, it was stipulated that on the face of three of the five relevant prime contracts there appeared the following (Tr. 439-440):

> This procurement was [ ] advertised [X] negotiated,
> Pursuant to [X] 10 U.S.C. §2304(a)(10)
> [ ] 41 U.S.C. §252(c)

and that the other two prime contracts were marked (Tr. 439-441):

> This procurement was [ ] advertised [X] negotiated,
> Pursuant to [X] 10 U.S.C. §2304(a)(14)
> [ ] 41 U.S.C. §252(c).

Finally, the government introduced into evidence Navy documents that authorized the negotiation of the five contracts and that set forth the findings on the basis of which such authorization was made (Gov. Exh. 34; Tr. 722). This direct proof amply supported the jury's verdicts. 9 Wigmore, *Evidence* §2534 (3d ed. 1940); McCormick, *Evidence* §343 (Cleary ed. 1972).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.